89-1750

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioners,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process of Law clause of the 14th Amendment to the United States Constitution guarantee to classified civil service employees the right to preserve the testimony presented at a pre-termination hearing when the testimony is used by the employer (appointing authority) to reach a decision imposing disciplinary action and affecting the employee's right to continued employment?

LIST OF PARTIES

The parties to the proceedings in the Supreme Court of Ohio were as follows:

Petitioner: Local 4501, Communications Workers of America

Respondents: The Ohio State University, Madison Scott, Vice President of the Ohio State University Office of Personnel Services, Ohio State University Hospitals, and Carson Michael Covert, Director of the Ohio State University Hospitals.

RELATED PARTIES

Local 4501, Communications Workers of America is affiliated with the Communications Workers of America and the AFL/CIO (American Federation of Labor/Congress of Industrial Organizations).

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No. _____

In The

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October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioners,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, Local 4501, Communications Workers of America, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio, docketed as Case No. 88-1772 in the court below and reported in 49 Ohio St. 3d 1 (1990), as Local 4501, *Communications Workers of America v. Ohio State Univ.*

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 49 Ohio St. 3d 1 (1990), and the decision is reprinted in the Appendix hereto, App. p. 1., *infra*.

JURISDICTION

This case originated in the Court of Common Pleas for Frankiin County, Ohio when its jurisdiction was invoked to render a declaratory judgment that civil service employees have a protected right to preserve testimony presented at a pre-termination/disciplinary hearing. The Court of Common Pleas found that there was no constitutional right to preserve this type of testimony. This decision was affirmed by the Court of Appeals for Franklin County, Ohio.

The Supreme Court of Ohio granted a petition for review of the decision of the Court of Appeals. On February 7, 1990, the Supreme Court of Ohio entered a judgment and opinion affirming the Court of Appeals.

This Court has jurisdiction to review a final judgment of the highest Court of the State of Ohio finding that there is no "constitutional due process right to have stenographic record or tape recording made of a pre-termination hearing" as provided by 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Due to the length of the provisions involved, pertinent portions of the following constitutional and statutory provisions are reproduced in the Appendix hereto, beginning at App. p. 14:

United States Constitution, Amendment 14

Ohio Constitution, Article I, Section 16

Ohio Constitution, Article XV, Section 10

Section 119.01, Ohio Revised Code

Section 119.09, Ohio Revised Code

Section 124.14(G), Ohio Revised Code

STATEMENT OF THE CASE

This case fundamentally involves a dispute between a labor union (Local 4501, CWA) and management (Ohio State University) as to the constitutional requirements of pre-termination hearings. Local 4501, Communications Workers of America, is a labor union organization which represents a substantial number of employees employed by The Ohio State University. All the employees are classified civil service employees within the meaning of Chapter 124, Ohio Revised Code. The University as the employer is the appointing authority within the statutes.

Local 4501 and the University have entered into labor agreements covering (1) skilled trades and maintenance employees and (2) service employees. Both agreements are in effect for the period May 11, 1985 through March 31, 1988. The relevant provisions in dispute here have

been incorporated into the present contracts that became effective March 31, 1988 and will expire in 1991. Local 4501 has the responsibility pursuant to the collective bargaining agreement to represent employees in disciplinary hearings conducted by the University. The agreements have a provision concerning the imposition of discipline upon the civil service employees in Article 11, Discipline. Article 11, in part provides:

> "11.3 No bargaining unit member covered by this Agreement shall be given a suspension, removal or demotion order without first being given an opportunity to attend a *hearing* at which the bargaining unit member or his representative may show cause why he or she should not be suspended, removed or demoted. (Emphasis added.)

The procedure contemplated by Article 11 requires that a hearing be conducted prior to the imposition of any discipline on members covered by the agreements. The University has adopted a policy that a hearing will not be conducted if the employee desires to preserve the testimony either by the use of a stenographic record or tape recorder. The Union has found that workers have been deprived of their jobs due to the inadequacies of the record prepared at this initial pre-termination hearing. The Union has found that the failure to preserve the record of this hearing encourages the changing of testimony in order to bolster and substantiate decisions taken by the University.

The Union took the position that preserving this testimony was a constitutionally protected right not subject to deprivation by the arbitrary action of the University.

The University's position was so absolute that the recording was not to take place that the Union felt that any attempts to resolve the issue through the contract provisions for resolution of disputes, grievance procedure and/or arbitration would be ineffective. The arbitrators powers are limited to the four corners of the agreements and do not extend to the constitutional requirements of due process.

On January 29, 1987, Local 4501, filed a complaint for declaratory judgment with the Common Pleas Court. The Union sought a declaration by the courts that there is a constitutional right under both the Ohio and Federal Constitutions to preserve testimony presented at pre-termination hearings of classified civil servants in the employ of the University. See, App. p. 29. On August 19, 1987, the Court of Common Pleas issued a decision granting summary judgment to the University on a finding that there is no constitutional right to preserve the testimony. The order was subsequently affirmed by the Court of Appeals.

The Ohio Supreme Court granted a writ of certiorari to review the decision of the Court of Appeals. On February 7, 1990, the Supreme Court rendered its opinion and judgment affirming the orders. See, App. pp. 1, 12, 13. The Supreme Court was of the opinion that a pre-termination hearing does not have to be elaborate and does not require preservation of testimony. The Court did not accept the Union's argument that the preservation of testimony was constitutionally required to avoid fabrication of testimony and the rendering of arbitrary decisions affecting the livelihood of the employees. Significantly

the Supreme Court of Ohio ignores the plight of employees that are subject to being dismissed and their lives ruined on constitutionally deficient procedures. Petitioner seeks this Court's review in order to finally settle the issue of what constitutes a meaningful pre-termination hearing.

REASONS FOR GRANTING THE WRIT

THE OHIO SUPREME COURT HAS DEPRIVED CIVIL SERVICE EMPLOYEES OF A PROCEDURAL DUE PROCESS CONSTITUTIONAL RIGHT TO PRESERVE TESTIMONY AT PRETERMINATION HEARINGS WHICH IS MEANT TO INSURE THAT THERE IS NO ARBITRARY DEPRIVATION OF THE CONSTITUTIONAL RIGHTS TO CONTINUED EMPLOYMENT.

The main issue before this Court is the constitutional requirements of due process of law under the 14th Amendment to the United States Constitution in a pre-termination hearing. The Ohio Supreme Court has found that the Constitution does not grant any rights to an employee to preserve the testimony used against him at this pre-termination hearing, even though the preservation would not place any onerous burden on the employer. The evidence presented at this hearing is used by the employer as the basis for imposing disciplinary action against the employee including dismissal from employment. The minimum requirements of due process of law are established by the Due Process Clause of the 14th Amendment and *not by State law. Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532 (1985); *Black v. Romano*, 471 U.S. 606, fn. 21 (1985).

Decisions of this Court have consistently held that before a protected property interest may be taken, a *prior* hearing must be held. *Arnett v. Kennedy* 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972). *Cf. Fuentes v. Shevin*, 407 U.S. 593 (1972) (pre-judgment replevin); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits).

In *Goldberg v. Kelly*, 397 U.S. at 267, after noting that the fundamental requirement of due process is the opportunity to be heard, this Court comments that "(t)he hearing must be at a meaningful time and in a *meaningful manner.*" (Emphasis added.) In *Fuentes v. Shevin*, 407 U.S. at 80, this Court states:

> "If the right to notice and hearing is to serve its full purpose, then it is clear that it must be granted at a time when deprivation can still be prevented."

In order for a pre-termination hearing to be meaningful it must be before the employee loses a protected property interest. Even if the employee prevails at a subsequent hearing, the granting of back pay and benefits cannot undo the fact that an arbitrary taking of a property right which was protected by the Constitutional right to due process has already occured.

A classified civil service employee in the state of Ohio, whether covered by an union contract or solely by state law, is entitled to a *meaningful* pre-termination hearing. See, *Loudermill, supra; Valan v. Cuyahoga County Sheriff*, 26 Ohio App. 3d 166 (1986).

In Ohio, a classified civil service employee has a constitutionally protected right to continued employment under the merit provisions of the Civil Service Constitutional provisions of Article XV, Section 10. These protected rights granted by the Ohio Constitution and laws are also supplemented by the provisions of the United States Constitution in Amendment 14. An employee cannot be dismissed except for cause. Due process of law requires that the hearing leading to the disciplinary action costing the employee his livelihood be such that the employee knows that the government (with all its might) has dealt with him fairly and equitably. Constitutional protections and rights belong to the employee and they cannot be taken away by the arbitrary actions of the state employer. In *Loudermill*, 470 U.S. at 546, this Court states that a pre-termination hearing entitles an employee to:

> "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Petitioner submits to this Court that in order to have a meaningful hearing the employee must be accorded the opportunity to have the evidence presented against him or in his favor preserved by means of a stenographic record or a recorder (video or tape). The right can be exercised without imposing any substantial burden on the employer since the cost of preservation can be placed on the employee desiring to exercise his right. Preservation of testimony is extremely important because it assures that there will be no future fabrication of testimony or evidence and will avoid mistaken decisions by the

public employer. The costs associated with the preservation of testimony are minimal. Furthermore, the recording of the testimony will not disrupt the pre-termination hearing since a court reporter or other recorder is very unobstrusive.

The employee has a right to present evidence on his behalf to an *impartial decision maker. Goldberg,* 397 U.S. at 271. This right is but an empty gesture if the employee cannot preserve the evidence presented. How can the employee show that the evidence supporting the decision was flawed? In addition, how can the employee show the bias or lack of impartiality on the part of the decision maker? One must keep in mind that the decision maker is an official of the employer.

In *Greene v. McElroy,* 360 U.S. 474, at 496-497 (1959) this Court states:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Governments' case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memory may be faulty or who, in fact might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."

The preservation of testimony is extremely important in the context of employment. The employee needs to show that the other employees who testify against him

may be "motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." Ill will of the other employee may lead to irreparable injury and arbitrary taking of the person's livelihood.

Preservation of evidence is also necessary to preserve factual disputes which are important to both the employee and the employer. Justice Brennan, in his concurring in part and dissenting in part opinion in *Loudermill*, 470 U.S. at 552, correctly surmises that:

> "where there exist not just plausible arguments to be made, but also 'substantial disputes in testimonial evidence,' due process may well require more than a simple opportunity to argue or deny. *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (MARSHALL, J., dissenting). * * * When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accusor in front of the decision maker."

Preservation of the testimony preserves the factual disputes and assures that the employee had a "fair opportunity" to present his side of the story. Preservation further avoids arbitrary decisions. Due process of law requires the imposition of guidelines that will avoid arbitrary decisions by the employer (the government). In *Daniels v. William*, 474 U.S. 327, at 331 (1986) this Court states:

> "The Due Process Clause of the Fourteenth Amendment provides: '(N)or shall any state deprive any person of life, liberty, or property, without due process of law.' Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to

> deprive a person of life, liberty or property. * * * This history reflects the traditional and commonsense notion that the Due Process Clause, like its forebear in the Magna Carta, * * * was 'intended to secure the individual from the arbitrary exercise of the powers of government.' * * * ('The touchstone of due process is *protection of the individual against arbitrary action of government.*') * * * " (Emphasis in original, citations omitted.)

The Administrative Procedure Act of Ohio, Chapter 119, Ohio Revised Code, further supports the position of the petitioner that Ohio law recognizes the right to preserve testimony in pre-termination hearings. Respondent, Ohio State University, is the appointing authority (Section 124.14 (G) Ohio Revised Code) for classified civil service employees within the University. In conducting pre-termination hearings as the appointing authority, the University conducts adjudication hearings as defined in Section 119.01, Ohio Revised Code. The University is empowered at the pre-termination hearing to determine whether the employee will be deprived of a constitutional right, to wit: the right to continued employment.

Section 119.09, Ohio Revised Code, in part provides:

> " * * * At any adjudication hearing required by sections 119.01 to 119.13, of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and any other evidence submitted shall be taken at the expense of the agency."

The Ohio Legislature recognized that procedural Due Process of Law requires the preservation of testimony whenever the government is adjudicating the rights of its citizens. The Supreme Court of Ohio did not find that this

provision would have applied to protect the right of the citizen, but found that the right did not even exist. The respondent, in the case at bar, presently conducts adjudicatory hearings wherein no record is kept of the testimony or evidence used to form the basis of the disciplinary action taken. This procedure even allows for *ex parte* presentation and consideration of evidence that often results in the removal of the employee. This procedure is inducive to the fabrication of testimony.

A decision maker is allowed free rein to render decisions adverse to the rights of employees possibly without him having any legal basis for the decision made. The employee's right to a hearing to show cause why he should not be disciplined then becomes an empty right. Not only is the employee handicapped by his lack of unlimited financial resources but he can be disciplined or terminated from his job even though he can establish that the discipline should not be imposed. Failure to have a record of the proceedings leads to many unreasonable and arbitrary decisions by the respondent. The tenets of due process require that parameters be imposed upon the arbitrary taking of property rights guaranteed by the 14th Amendment to the United States Constitution by requiring the existence of reasonable grounds for the actions of respondent.

What can be more important than a person's job which constitutes the family's livelihood? Preservation of testimony presented at the pre-termination hearing guarantees that the employer and the decision maker *may have "(r)easonable grounds* to believe that the charges against the employee are true and support the proposed action."

(Emphasis added.) *Loudermill,* 470 U.S. at 545-546. Preserving testimony presented at the pre-termination hearing does not impose a substantial burden on either party. The preservation of the testimony would be a cross-check to capricious actions of administrative officers.

"The Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. *Loudermill,* 470 U.S. at 541. In order for a hearing to be meaningful, it must be prior to the losing of a protected right and must be in such a way that it avoids arbitrary governmental action. The constitutional right to a pre-termination hearing carries with it the requirement that the testimony and evidence used to support a decision adverse to the employee must be preserved. Preservation of the testimony will not unduly interfere with the decision making powers of the administrator but will assure that he has reasonable grounds for his decision. Preservation of testimony will guarantee that no arbitrary taking of constitutionally protected property rights will occur.

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari to the Supreme Court of Ohio, in order to enforce the due process constitutional right of civil service employees to preserve testimony presented at pre-termination hearings by means of a stenographic record or tape recording.

Respectfully submitted

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CASES

ARGUED AND DETERMINED

IN THE
SUPREME COURT OF OHIO
JANUARY TERM, 1989.

HON. THOMAS J. MOYER, CHIEF JUSTICE.
HON. A. WILLIAM SWEENEY,)
HON. ROBERT E. HOLMES,)
HON. ANDY DOUGLAS,) JUSTICES.
HON. J. CRAIG WRIGHT,)
HON. HERBERT R. BROWN,)
HON. ALICE ROBIE RESNICK,)

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA, APPELLANT, *v.* OHIO STATE UNIVERSITY ET AL., APPELLEES.

[Cite as Local 4501, Communications Workers of America *v.* Ohio State Univ. (1990), 49 Ohio St. 3d 1.]

Public employment – Classified employees of the state must be afforded pretermination disciplinary hearing – No due process right to have stenographic record made of hearing.

O.Jur 3d Civil Servants § 145.

1. A classified civil servant employee of the state of Ohio must be afforded a pretermination disciplinary hearing; however, such hearing need not be elaborate, but must afford the employee notice and the opportunity to have an explanation of the employer's charges and evidence against him, and an opportunity to present his side of the story. (*Cleveland Bd. of Edn. v. Loudermill* [1985], 470 U.S. 532, applied and followed.)

2. A classified civil service employee of the state of Ohio does not have a constitutional due process

right to have a stenographic record or a tape recording made of pretermination disciplinary hearing.

(No. 88-1772 – Submitted November 21, 1989 – Decided February 7, 1990.)

APPEAL from the Court of Appeals for Franklin County, No. 87AP-902.

Local 4501, Communications Workers of America ("Union"), is a labor organization which represents a great number of employees at the Ohio State University ("University"). Local 4501 and the University have entered into labor agreements covering skilled trades, maintenance and service employees. The agreements have a provision concerning the imposition of discipline upon the civil service employees in "Article 11, Discipline," as follows:

"11.3 No bargaining unit member covered by this Agreement shall be given a suspension, removal or demotion order without first being given the opportunity to attend a hearing at which the bargaining unit member or his representative may show cause why he or she should not be suspended, removed or demoted. * * * "

The procedure contemplated by Article 11 requires that a hearing be conducted prior to any discipline being imposed upon members covered by the agreement. The Union has requested the University to allow either a court stenographer or a tape recording to preserve the testimony given at the pretermination disciplinary hearing. The University has refused to allow the Union to utilize either of these methods or other alternatives to preserve the testimony at these hearings.

In its complaint in the Court of Common Pleas of Franklin County, seeking a declaratory judgment as to whether a record of the pretermination hearing is a constitutional right of these employees, the Union alleged that:

"The policy, regulation, and/or directive adopted by the University in refusing to allow a record to be made of testimony presented at disciplinary hearings is unreasonable, unconstitutional, contrary to Ohio and Federal law, in that it jeopardizes and interferes with an employee's right to continued employment and to present his evidence at a disciplinary hearing. The procedure adopted by the University encourages the changing of testimony in order to bolster and substantiate decisions taken by the University to empose [*sic*] disciplinary action upon employees."

The trial court, upon defendants' motion to dismiss which was converted to a motion for summary judgment, found that plaintiff has no constitutional right to record a pretermination hearing, that rights of plaintiff must rest on grounds other than due process, and that, as a matter of law, the plaintiff's action must be dismissed.

The court of appeals affirmed the judgment of the trial court.

The cause is now before this court upon the allowance of a motion to certify the record.

Francisco A. Garabis, for appellant.

Anthony J. Celebrezze, Jr., attorney general, *Moots, Cope & Kizer Co., L.P.A., Elizabeth M. Stanton* and *Wanda L. Carter*, for appellees.

HOLMES, J. The Union appeals to this court setting forth the singular proposition of law that "due process of law guarantees a classified civil service employee of the state of Ohio [the right] to preserve testimony presented by the appointing authority and himself at a pretermination disciplinary hearing."

As properly relied upon by the court of appeals below, *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 522, is the controlling case that speaks to the issue of what process is due an employee in a pretermination hearing. The *Loudermill* court held generally that "the pretermination 'hearing,' though necessary, need not be elaborate" and that " * * * 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545. More specifically, the *Loudermill* court set forth the basic requirements as follows:

"The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. * * * [Citation omitted.] The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. * * * [Citation omitted.] To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

Upon remand of the matter in *Loudermill*, the Sixth Circuit Court of Appeals, in affirming the decision of the

district court, further clarified the process due an employee in such a pretermination hearing, as follows:

"The applicable substantive law is settled. It is clearly established that Loudermill, as a tenured public employee, was entitled to a pretermination hearing. *Cleveland Board of Edn. v. Loudermill*, 470 U.S. 532, 545, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985). Such a hearing, *though necessary*, 'need not be elaborate.' *Id.* In fact, the employee is *only* entitled to:

"[i] oral or written notice of the charges against him;

"[ii] an explanation of the employer's evidence; and

"[iii] an opportunity to present his side of the story." *Id.* 470 U.S. at 546, 105 S. Ct. at 1495.

"In this case, an onerous burden is not placed upon the employer by these requirements. Indeed, the Supreme Court has stated that where state law provides for a full administrative post-termination hearing and judicial review, the pretermination hearing:

"[']need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.[']

"*Id.* at 545-46, 105 S. Ct. at 1495. The Supreme Court, in *Loudermill*, held that to require more than this 'prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.' *Id.* at 546, 105 S. Ct. at 1495.

" * * *

" * * * Indeed, courts construing the Supreme Court's language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place * * * ." *Loudermill v. Cleveland Bd. of Edn.* (C.A. 6, 1988), 844 F. 2d 304, 310-312.

As noted by the Supreme Court in *Loudermill,* the purpose of the constitutionally required pretermination hearing is not to definitively resolve the factual or legal issues involved in a termination. Rather, it is simply "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action * * * ." *Cleveland Bd. of Edn. v. Loudermill, supra,* at 545-546. The court in arriving at its determination set forth that a consideration of all aspects of any hearing rights afforded by the employer to the employee by state law must be balanced as to the due process afforded. The court stated: "We have pointed out that '[t]he formality and procedural requisition for the hiring can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' * * * Under state law, respondents were later entitled to a full administrative hearing and judicial review * * * . Our holding rests in part on the provisions in Ohio law for a full post-termination hearing."[1] *Id.* Just as

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[1] Accordingly, footnote 6 of the opinion in *Cleveland Bd. of Edn. v. Loudermill, supra,* at 539-540, sets forth:

"After providing for dismissal only for cause, see n. 4, supra, § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the

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the Supreme Court in *Loudermill* looked to the determinative law in Ohio at that time regarding due process hearing rights, we must also look to the current law in Ohio regarding such pretermination hearing rights. In addition to those rights still available in R.C. Chapter 124, R.C. 4117.10(A) provides, in pertinent part, that:

"An agreement between a public employer and an exclusive representative entered into pursuant to Chapter 4117, of the Revised Code governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure * * * ."

Here, there are collective bargaining agreements entered into between the representatives of the employees,

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reasons therefor. Within 10 days of the filing of the order with the Director of Administrative Services, the employee may file a written appeal with the State Personnel Board of Review or the Commission. 'In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.' Either side may obtain review of the Commission's decision in the State Court of Common Pleas."

Local 4501, and the Ohio State University. Such agreements in Articles 8 through 11 outline the grievance and arbitration procedures afforded the employees covered by the agreements.[2] In essence such provisions provide

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[2] The collective bargaining agreements between the parties provide, in pertinent part:

"8.2 A grievance, under this procedure, may be brought by any bargaining unit member.

"8.3 No grievance may be processed under this article which is appealable to the State Personnel Board of Review or has been processed under Article 9, Resolution of Disputes, or any other Grievance Procedure. *Beginning April 1, 1986, all employee grievances including those matters previously appealable to the State Personnel Board of review [sic], shall be processed under Article 8 or 9, whichever is appropriate.* No grievance shall be taken to arbitration if the identical issue of the arbitration is pending before or has been decided by the State Employment Relations Board involving identical parties.

" * * *

"[8.14, C.] 6. If the Union is not satisfied with the University's final decision, it may submit the grievance to impartial arbitration under the provisions of Article 10, by written notice to the Director of Employee Relations within ten (10) working days after receipt of the Director's final decision.

" * * *

"ARTICLE 9

"RESOLUTION OF DISPUTES

"9.1 The parties to this Agreement, recognize that disputes will arise relative to interpretation of this Agreement which cannot be appropriately resolved through Article 8, Grievance Procedure. This procedure will only be used for those disputes, the nature of which cannot be effectively resolved by the supervisor at Level One or by the administrator at Level Two of the Grievance Procedure.

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full post-termination hearing rights to the plaintiff employees through impartial binding arbitration. Thus, it is

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" * * *

"9.5 Should the Union disagree with the decision of the University, it may, within (10) working days following receipt of the University's decision, request that the dispute be submitted to impartial arbitration under the provisions of Article 10, Arbitration.

" * * *

"ARTICLE 10

"ARBITRATION

"10.1 A panel of three arbitrators shall be selected by the parties to serve on a continuing basis. The panel shall be assigned cases in rotating order designated by the parties. If an arbitrator is not available to hear a case within 60 calendar days, the case will be assigned to the arbitrator who can hear the case at the earliest date. Each arbitrator shall serve until his services are terminated by written notice by either party to the other. The arbitrator shall conclude his services by deciding any arbitration which may have been previously heard. A successor arbitrator shall be selected by the parties.

"10.2 The University agrees to allow the grievant any necessary witnesses requested by the employee, time off with pay to attend the hearing. All other fees and expenses of the arbitration shall be borne equally by the University and the Union. The fees and expenses of the arbitration are defined as follows:

"A. The cost of a *stenographer/reporter* as requested by the arbitrator or the parties thereto and the associated transcription costs. If a party desires a transcript of the proceedings, the total cost for such transcription shall be paid by the party

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the arbitration hearing, not the pretermination hearing, that is the equivalent of the State Personnel Board of Review hearing. As provided by the agreements between the parties, a record of the arbitration hearing is allowed.

We agree with the conclusion of the court of appeals that, "[a]ccordingly, there is no compelling necessity for preserving the evidence received at the pretermination hearing since a full *de novo* hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the State Personnel Board of Review whichever may be applicable." We hold that a classified civil service employee of the state of Ohio must be afforded a pretermination disciplinary hearing; however, such hearing need not be elaborate, but must afford

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(Continued from previous page)

desiring the transcript. If the other party desires a copy then the total cost of such transcription shall be shared equally by both parties.

" * * *

"ARTICLE 11

"DISCIPLINE

" * * *

"11.3 No bargaining unit member covered by this Agreement shall be given a suspension, removal or demotion order *without first being given the opportunity to attend a hearing at which the bargaining unit member or his representative may show cause why he or she should not be suspended, removed or demoted.* The local union will be advised at least forty-eight (48) hours in advance of such hearing and will, with such notification, be provided with a statement of the charge or charges alleged. The Local Union President and a steward may attend such hearing without loss of pay." (Emphasis added.)

the employee the opportunity to have an explanation of the employer's charges and evidence against him, and an opportunity to present his side of the story. *Cleveland Bd. of Edn. v. Loudermill, supra,* applied and followed.

However, as found by the trial court and the court of appeals, we also hold that a classified civil service employee of the state of Ohio does not have a constitutional due process right to have a stenographic record or tape recording made of a pretermination hearing.

The court of common pleas properly granted summary judgment in this case, and the court of appeals properly affirmed, on the basis that there exists no constitutional right to preserve evidence at a pretermination hearing.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., WRIGHT, H. BROWN and RESNICK, JJ., concur.

SWEENEY and DOUGLAS, JJ., dissent.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: February 7, 1990

Local 4501, Communications Workers of America,	:	
Appellant,	:	Case No. 88-1772
v.	:	MANDATE
Ohio State University et al.,	:	
Appellees.	:	

To the Honorable Court of Common Pleas

Within and for the County of Franklin, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Francisco A. Garabis.

(Court of Appeals No. 87AP902)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1990 TERM

To wit: February 7, 1990

Local 4501, Communications Workers of America,	:	Case No. 88-1772
Appellant,	:	JUDGMENT ENTRY
v.	:	APPEAL FROM
Ohio State University et al.,	:	THE COURT OF APPEALS
Appellees.	:	

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellant their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 87AP902)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

14th AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT [XIV]
[RIGHTS OF CITIZENS]

§ 1 [3]All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall [2]make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [2]deprive any person of life, liberty, or property, without due process of law; nor [4]deny to any person within its jurisdiction the equal protection of the laws.

§ 2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

• § 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an

oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

• This section is now obsolete.

§ 4 The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

§ 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proposed, 1888, effective, 1864.

ARTICLE I, SECTION 16 OHIO CONSTITUTION

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation,

shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Vote: "Yes," 306,764: "No." 216,634.

Original § 16 read as follows: "Sec. 16. [Of redress in courts.] All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay. (See Const 1802, Art VIII, § 7.)"

Art. XV, § 10

§ 10 Civil service.

Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Law shall be passed providing for the enforcement of this provision. (Adopted September 3, 1912.)

Vote: "Yes," 306,767; "No," 204,580.

DEFINITIONS

119.01 Definitions

As used in sections 119.01 to 119.13 of the Revised Code:

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

HISTORY: 1985 H 201, eff. 7-1-85
1984 H 244; 1983 H 260; 1980 H 403; 1979 H 204; 1977 H 257; 1976 S 545, H 920; 1975 H 1; 1973 H 366; 1969 H 1; 132 v S 97; 1953 H 1; GC 154-62

NOTE: This section was amended by 1989 H 111, eff 7-1-89, Amendment did not affect above section.

119.09 Adjudication hearing

As used in this section "stenographic record" means in the case of a hearing before the state personnel board of review, a record provided by stenographic means or by the use of audio electronic recording devices, as the board determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of said hearing as required by section 119.07 of the Revised Code, shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirement of a subpoena issued from such court, or a refusal to testify therein. At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situation in which a stenographic record will be made only on request of the party, otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to

admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and authority in conducting said hearing as granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party

within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

HISTORY: 1979 H 102, eff. 5-29-79

1953 H 1; GC 154-70

124.14

(G) With respect to officers and employees of state-supported colleges and universities except for the powers and duties of the state personnel board of review, the powers, duties, and functions of the department of administrative services and the director of administrative services specified in Chapter 124 of the Revised Code are hereby vested in and assigned to the personnel departments of such colleges and universities subject to a periodic audit and review by the director of administrative services to guarantee the uniform application of this granting of his powers, duties, and functions. Upon the determination or finding of the misuse or nonuniform application of this authority granted to the personnel department of such state-supported colleges and universities, the director of administrative services shall order and direct the personnel functions of such institution until sections 124.01 to 124.64 of the Revised Code have been fully complied with.

HISTORY: 1985 S 96, eff. 7-18-85

1985 H 309; 1982 S 118; 1981 H 694; 1977 H 734, H 260; 1975 H 155

Note: § 124.14(G) was re-numbered § 124.14(F) by 1989 H 552, eff. 7-14-89

LABOR AGREEMENT BETWEEN
LOCAL 4501 AND OHIO
STATE UNIVERSITY

ARTICLE 11
DISCIPLINE

11.1 No bargaining unit member shall, for disciplinary reasons, be reduced in pay or position, suspended, discharged or removed except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office, nor shall such bargaining unit member receive any other form of corrective action except for just cause. Beginning April 1, 1986, any dispute by a unit member regarding a discipline matter shall be subject to the grievance procedure and cannot be appealed to the State Personnel Board of Review.

11.2 When it is necessary to suspend, discharge, reprimand or demote a bargaining unit member, such action will be taken within thirty (30) calendar days following the last alleged infraction. In the event of a serious incident, the thirty (30) day time limit will begin upon the University's discovery of such incident. The University agrees that it will not unreasonably or arbitrarily delay in the processing of any contemplated disciplinary action. The provisions of this article shall apply only to actions taken for disciplinary reasons. Demotions as used in this article shall not mean demotions while on probation.

11.3 No bargaining unit member covered by this Agreement shall be given a suspension, removal or demotion order without first being given the opportunity to attend

a hearing at which the bargaining unit member or his representative may show cause why he or she should not be suspended, removed or demoted. The local union will be advised at least forty-eight (48) hours in advance of such hearing and will, with such notification, be provided with a statement of the charge or charges alleged. The Local Union President and a steward may attend such hearing without loss of pay.

11.4 The principle of corrective action will be followed with respect to minor offenses as defined by the University. A written warning will precede any suspension for such offenses and one or more suspension(s) will precede dismissal for such offenses. The first suspension for minor offenses will not exceed three (3) days.

11.5 Upon written request to his department, a bargaining unit member shall have the records of any reprimand or suspension removed from his personnel file, provided there have been no reprimands or disciplinary actions for a continuous period of one (1) year.

11.6 If the application of 11.5 results in removal of records of suspensions greater than three (3) days, those records may be used in subsequent disciplinary actions for the purpose of showing progressive discipline for a period of one (1) year following the removal of such records from the bargaining unit member's personnel file.

11.7 If the University's action is based in whole or in part on portions of the bargaining unit member's record, such portions of the bargaining unit member's record will be made available for inspection by the bargaining unit member or by an appropriate union steward with written

authorization from the bargaining unit member during normal working hours and within one (1) working day after receipt of the request.

11.8 Copies of all reprimands, notice of suspension, demotion or dismissal will be given to the bargaining unit member and copies of suspension, demotion or removal orders will be given to the Local Union President. A copy of a written reprimand issued to an employee for excessive absenteeism and/or tardiness will be given to the Union.

LABOR AGREEMENT BETWEEN
LOCAL 4501 AND
OHIO STATE UNIVERSITY

ARTICLE 10

ARBITRATION

10.1 A panel of three arbitrators shall be selected by the parties to serve on a continuing basis. The panel shall be assigned cases in rotating order designated by the parties. If an arbitrator is not available to hear a case within 60 calendar days, the case will be assigned to the arbitrator who can hear the case at the earliest date. Each arbitrator shall serve until his services are terminated by written notice by either party to the other. The arbitrator shall conclude his services by deciding any arbitration which may have been previously heard. A successor arbitrator shall be selected by the parties.

10.2 The University agrees to allow the grievant any necessary witnesses requested by the employee, time off

with pay to attend the hearing. All other fees and expenses of the arbitration shall be borne equally by the University and the Union. The fees and expenses of the arbitration are defined as follows:

A. The cost of a stenographer/reporter as requested by the arbitrator or the parties thereto and the associated transcription costs. If a party desires a transcript of the proceedings, the total cost for such transcription shall be paid by the party desiring the transcript. If the other party desires a copy then the total cost of such transcription shall be shared equally by both parties.

B. The fees and expenses of the arbitrator used in the case.

C. The fees and other charges which may come from any association from which an arbitrator is obtained.

D. Other expenses related to the arbitration proceedings.

10.3 The arbitrator shall be requested to submit a total accounting for the fees and expenses of arbitration as outlined above.

10.4 The arbitrator shall be requested to render his decision as quickly as possible, but in any event, no later than thirty (30) calendar days after the conclusion of the hearing unless the parties agree otherwise.

10.5 Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement or a specific University policy as outlined in the Operating Manual shall be subject to arbitration. The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement or provisions of the

Operating Manual, nor shall he substitute his discretion for that of the University nor impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement or the Operating Manual. The arbitrator's decision shall be final and binding provided such decision does not exceed the jurisdiction of the arbitrator as set forth herein.

10.6 Prior to submission to arbitration pursuant to this article, the University and the Union shall meet and reduce to writing, the issue or issues to be placed before the arbitrator. The arbitrator's decision shall address itself solely to the issue or issues presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues.

10.7 The University will be responsible for notification to a grievant of the time and place of his arbitration hearing.

10.8 The Union and the University agree that it is important to process grievances in a timely fashion and to move promptly through the arbitration process. The procedure in 10.1 is intended to provide a prompt and economical arbitration process, and when disputes do not involve interpretation of the Agreement, the parties will seek to encourage a further expedited arbitration process.

10.9 The University shall permit necessary witnesses, the involved steward and the grievant(s) necessary and reasonable time off without pay for preparation of arbitration cases so long as the absence of the requested

employee(s) will not adversely effect operations. Requests for time off under this section are to be submitted and processed under the provisions of Article 16, Leave.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA 1475 N. High Street Columbus, Ohio 43201, Plaintiff, v. THE OHIO STATE UNIVERSITY 190 North Oval Columbus, Ohio 43210 and MADISON SCOTT, Vice President The Ohio State University Office of Personnel Services Archer House 2130 Neil Avenue Columbus, Ohio 43210, and OHIO STATE UNIVERSITY HOSPITALS 410 W. Tenth Avenue Columbus, Ohio 43210, and CARSON MICHAEL COVERT, Director Ohio State University Hospitals 410 W. Tenth Avenue Columbus, Ohio 43210, Defendants.	Case No. 87CV-01-623 COMPLAINT FOR DECLARATORY JUDGMENT

COMPLAINT FOR DECLARATORY JUDGMENT

1. Local 4501, Communications Workers of America, [hereinafter referred to as Local 4501] is a labor

organization which has a labor agreement with the Defendant, The Ohio State University. Local 4501 represents as a labor organization members who are employed by Defendant, The Ohio State University, as civil service employees within the meaning of Chapter 124, Ohio Revised Code.

2. George Dawson, Brent Whetstone, Mike Butles, Lucian Smith, Thomas Jefferson, Hubert Kyton, Mark Oates, Carla Baxter, Betty Davis, Robert Gregory, Evita Pearce, Albert Caldwell, Dan Kelly, Thomas Thigpen, Emmett McAfee, Bob Woodland, John Holmes, Harry Williams, Marcus Brainard, Perry Beidleman, John Kent, Willie Tatum Renee Hines, Debra Ferguson, Donald Gatewood, Clayton Perkins, Don Mark, Rodolfo Forras, Brenda Martin, Freddie Middlebrook, Felecia Robinson, Yvonne Boyd, Alfredo Williams, Sandra James, Tom Croft, Rayford Davison, Harold Thacker, Kerry Carpenter, Terrance Johnson, George Woods, Richard Kathary, Pearly Price, Walter Turner, Charles Easley, Julie George, William Garland, Regina Kent, Christal Woods, Toccus Lawson, Dave Johnson, Garry Wright, Carolyn Jones, Joseph Mayer, Kenneth Gilbaugh, Rolinda Woods, Thomas Williams, David Johnson, Stephanie Kibbey, Albert Caldwell, Nick Benedetto, Edward Hayes, Barbara Harper, Maxine Clark, Atlel Perkins, Victor O'Brien, Lawrence Slaughter, Eloise Johnson, John Hone, Jeffrey Horton, William Gaines, Deborah Simmons, Jerry McGowaan, James Lee, Ronald Broadus, John Orr, Leonard Cooley, William Robinson, Derrick Winkfield, Victor Mitchell, Bertha Wyke, Mike Williams, Michael Payne, are or were employed by The Ohio State University and are or were members of Local 4501, Communications Workers of

America who are/were affected by the matters covered by this Complaint.

3. Defendant, The Ohio State University [hereinafter referred to as University], is a public employer as defined by Section 4117.01(B), Ohio Revised Code, and pursuant to the provisions of Chapter 124, Ohio Revised Code.

4. Madison H. Scott, Vice President, The Ohio State University, is the person in charge of Personnel at the University and the officer designated as the appointing authority pursuant to Chapter 124, Ohio Revised Code.

5. The Ohio State University Hospitals is a department of Defendant, The Ohio State University. Carson Michael Covert is the Director of the Ohio State University Hospitals and as such is the person in charge of personnel at the hospitals.

6. Madison H. Scott, in his official capacity as Vice President of Personnel Services of the University, has been delegated the authority to adopt and promulgate the rules, regulations, guidelines and directives purporting to govern the conduct of the University employees, including members of Local 4501. The rules, regulations, guidelines and directives are adopted, enacted and/or issued for purposes of putting into practice and enforcing the provisions of Chapter 124, Ohio Revised Code.

7. Plaintiff, Local 4501, and the University had entered into a labor Agreement covering Skilled Trades and Maintenance Employees and a separate agreement covering Service Employees. Both Agreements were entered

into effective May 11, 1986 through March 31, 1988. Copies of the Agreements are readily available to both Plaintiff and Defendant and are not attached hereto due to the voluminous nature of both documents which together contain in excess of 100 pages. Each of the Agreements contain Article 11, Discipline. Article 11, in part, provides as follows:

> "11.1 No bargaining unit member shall, for disciplinary reasons, be reduced in pay or position, suspended, discharged or removed except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office, nor shall such bargaining unit member receive any other form of corrective action except for just cause. Beginning April 1, 1986, any dispute by a unit member regarding a discipline matter shall be subject to the grievance procedure and cannot be appealed to the State Personnel Board of Review."
>
> * * *
>
> 11.3 No bargaining unit member covered by this Agreement shall be given a suspension, removal or demotion order without first being given the opportunity to attend a hearing at which the bargaining unit member or his representative may show cause why he or she should not be suspended, removed or demoted. The local union will be advised at least forty-eight (48) hours in advance of such hearing and will, with such notification, be provided with a statement of the charge or charges alleged. The Local Union President and a steward may attend such hearing without loss of pay."

8. The procedure contemplated in Article 11 of the labor Agreement requires that a hearing be conducted prior to discipline being imposed on members covered by said Agreements. The University has adopted a policy, rule, regulation, guideline and/or directive which provides that no record or written memorials shall be made of the testimony adduced at the hearing. Local 4501 has advocated and informed the University that the requirements of due process of law require that a record be made of the testimony presented at any disciplinary hearing.

9. The University has been requested to submit the matter to resolution of disputes in accordance with the requirements of the Agreement, but the University has refused to allow the recording and preservation of the testimony presented at the hearings. See copy of letters attached as Exhibits A and B. The University's position is so absolute that any attempts to resolve this issue in accordance with the resolution of disputes, grievance procedure and arbitration articles of the Agreement would be ineffective.

10. The policy, regulation, and/or directive adopted by the University in refusing to allow a record to be made of testimony presented at disciplinary hearings is unreasonable, unconstitutional, contrary to Ohio and Federal law, in that it jeopardizes and interferes with an employee's right to continued employment and to present his evidence at a disciplinary hearing. The procedure adopted by the University encourages the changing of testimony in order to bolster and substantiate decisions taken by the University to empose [sic] disciplinary action upon employees.

11. Local 4501 is responsible for representing members at disciplinary hearings. The policy of the University in refusing to allow a record to be made of the testimony presented unduly interferes with the attempts of Local 4501 to adequately represent its members in disciplinary hearings.

12. All union members covered by the Agreement are adversely affected by the policy of the University.

WHEREFORE, Plaintiff prays for a declaratory judgment that the policy of The Ohio State University in refusing to permit a record to be made [through videotape, stenographic means, tape recording and/or other method of preserving testimony] is unlawful, unenforceable and void and contrary to the provisions of The Ohio and Federal Constitutions in that it deprives employees of due process of law. Plaintiff further requests a judgment declaring the rights and obligations of the parties in conducting disciplinary hearings, together with costs expended herein plus a reasonable amount in attorney fees and any other relief to which Plaintiff may be entitled at law or equity.

/s/ Francisco A. Garabis
FRANCISCO A. GARABIS
(GAR 15)
765 South High Street
Columbus, Ohio 43206
(614) 443-0305
Attorney for Plaintiff,
Local 4501, Communications
Workers of America.

Exhibit A

The Ohio State University

OSU

Office of Personnel Services

Archer House
2130 Neil Avenue
Columbus Ohio, 43210-1175

January 23, 1987

Mr. James C. Ervin
President, Local 4501
Communications Workers of America
1475 North High Street
Columbus, Ohio 43201

Dear Mr. Ervin:

In response to your telephone conversation of today, I am attaching a copy of a letter sent to you on July 9, 1986 from this office which reflects the University's position on the taping of pre-disciplinary hearings.

Our position has not changed.

Sincerely,

/s/ Mark W. Ringer
Mark W. Ringer
Assistant Director, Employee Relations

MWR/avs
Attachment

Exhibit B

The Ohio State University

OSU

Office of Personnel Services

Archer House
2130 Neil Avenue
Columbus Ohio, 43210-1175

July 9, 1986

Mr. James C. Ervin
President, Local 4501
Communications Workers of America
1475 North High Street
Columbus, Ohio 43201

Dear Jim:

This letter is in response to your recent concerns regarding the procedural aspects of pre-disciplinary hearings conducted pursuant to Article 11 of the labor agreements. The most significant change you have suggested is the introduction of either a tape recorder or court reporter to such hearings. Your rationale for the need is that the union must now have a formal record of the pre-disciplinary proceeding, since bargaining unit members can no longer appeal disciplinary actions to the State Personnel Board of Review.

The University is not inclined to allow the presence of either a tape recorder or court reporter at pre-disciplinary hearings. In order to explain this position, I must first examine the purpose of such hearings.

The purpose, as noted in Section 11.3 of both agreements, is for a bargaining unit member or his representative to show cause why he should not be disciplined. The recording of a pre-disciplinary hearing does nothing to

assist an employee or his representative in explaining why he shouldn't be disciplined. Additionally, there is no requirement in either labor agreement which forces the University to comply with your request.

Your argument that pre-disciplinary hearings now replace an employee's previous right to have his appeal heard before the S.P.B.R. simply doesn't make sense. All disciplinary actions must now be processed through the applicable grievance procedure, rather than appealed to the S.P.B.R., meaning that *only* the post-disciplinary procedure has been altered – not that which occurs prior to the imposition of discipline.

Mr. James C. Ervin
Pg. 2.

In conclusion, we will not allow the taping or recording of the proceedings during a pre-disciplinary hearing. Union representatives may, as in the past, take written notes of the hearing.

Sincerely,

/s/ William A. LaFramboise
Director, Employee Relations
WAL/avs

Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1750

In The

Supreme Court of the United States

October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioners,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

FRANCISCO A. GARABIS
Counsel for Petitioner, Local 4501, Communications Workers of America
765 South High Street
Columbus, Ohio 43206
(614) 443-0305

(C) 302

SUPPLEMENTAL APPENDIX

Enclosed herein for the Court's consideration are the unreported opinions of the lower courts in this matter, to wit:

A. Court of Appeals for Franklin County, Ohio, Case No. 87AP-902,

B. Common Pleas Court for Franklin County, Ohio, Case No. 87CV-01-623.

Both matters were captioned: *Local 4501, Communications Workers of America v. The Ohio State University, et al.*

Respectfully submitted

FRANCISCO A. GARABIS
Counsel for Petitioner,
Local 4501, Communications Workers of America
765 South High Street
Columbus, Ohio 43206
(614) 443-0305

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Local 4501, Communications Workers of America,	:	
Plaintiff-Appellant,	:	
v.	:	No. 87AP-902
The Ohio State University et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

OPINION

Rendered on August 11, 1988

MR. FRANCISCO A. GARABIS, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General; MOOTS, COPE & WEINBERGER CO., L.P.A., MS. ELIZABETH M. STANTON and MS. WANDA L. CARTER, for appellees.

APPEAL from the Franklin County Common Pleas Court.

WHITESIDE, P.J.

Plaintiff, Local 4501, Communications Workers of America, appeals from a decision of the Franklin County Court of Common Pleas and raises the following assignment of error:

> "The Court of Common Pleas committed reversible error by dismissing the action by finding that civil service employees are not entitled to preserve the testimony given at a pre-termination hearing."

Plaintiff represents a substantial number of employees who are classified as civil servants within the meaning of R.C. Chapter 124 and employed by defendants, Ohio State University et al., (OSU) and, as such, is responsible, pursuant to a collective bargaining agreement, to represent such employees in disciplinary hearings conducted by defendants.

Plaintiff and defendants entered into labor agreements which contain a provision requiring a "show cause" hearing conducted by defendants before an employee may be suspended, removed or demoted. Ordinarily, no record is made of the testimony of this hearing. Plaintiff-union requested that the defendants allow it to bring in either a court stenographer or a tape recorder so that the testimony can be preserved. The defendants refused to allow a record of the hearing. Plaintiff filed a complaint in the Franklin County Court of Common Pleas seeking a declaratory judgment as to whether a record of the pre-disciplinary proceedings is a constitutional right to which plaintiff's members are entitled.

The trial court, upon defendants' motion to dismiss which was converted to a motion for summary judgment, found that plaintiff has no constitutional right to record a pre-termination hearing, that any rights of plaintiff must rest on grounds other than due process and, that as a matter law, plaintiff's action must be dismissed.

Plaintiff contends that it was improper for the trial court to grant summary judgment based on the complaint, affidavits and attachments to a motion to dismiss contending that a civil service employee has a right to a pre-termination hearing under the Due Process Clause of

the Fourteenth Amendment to the United States Constitution and has a right to have facts presented at the pretermination hearing and has a right to have the record preserved.

Defendants filed a motion to dismiss pursuant to Civ. R. 12(B)(6), which states that " * * * [w]hen a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * * * All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." The staff notes to Civ. R. 12(B) state that "[w]hile provisions under consideration were thought to provide desirable flexibility, the procedure is optional with the court, and presumably in most situations a court should exclude matter outside the pleading, thereby making it necessary for defendant to move formally for summary judgment under Rule 56 in order to present matters outside the pleadings." While, as the staff notes reflect, Civ. R. 12(B)(6) motions are not automatically to be treated as a motion for summary judgment, Civ. R. 12(B) is designed to provide flexibility at the option of the court.

In this case, the trial court requested the parties to file affidavits. Previous to that, the trial court had on file defendants' motion to dismiss with supporting materials and plaintiff's response to defendants' motion to dismiss with supporting materials. There were no facts in dispute at any time, and the only issue before the court was whether, by law, the plaintiff was entitled to a declaratory judgment requiring that a record be made of the

pre-termination hearings. The trial court found no law which would afford plaintiff a constitutional right under the Due Process Clause to record a pre-termination hearing. Summary judgment can be found where, under Civ. R. 56, there is no genuine issue as to any material fact and the moving party, in this case the defendants, is entitled to judgment as a matter of law. This may be found only when reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made construing the evidence most strongly in its favor.

In this case, the trial court correctly decided to convert a motion to dismiss to a motion for summary judgment after requesting affidavits from each party, and based thereon found that no facts were at issue and that the decision was one which could be decided entirely by law. The trial court determined that the plaintiff, by law, had no constitutional right under the Due Process Clause to the preservation of testimony by means of a record at a pre-termination hearing.

The plaintiff contends that *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532 requires a pre-termination hearing and then contends that *Loudermill, supra,* requires a preservation of testimony at the pre-termination hearing to avoid false testimony, mistaken decisions and arbitrary actions of the employer. The United States Supreme Court in *Loudermill, supra,* found that Chapter 124 creates for the employee a property interest in continued employment when such employee holds a classified position for good behavior which allows dismissal for only limited reasons. Moreover, the Due Process Clause

of the United States Constitution, because the employment is a property right, requires notice and the opportunity for a hearing, appropriate to the nature of the case, before any one may be deprived of that employment property right. The hearing must occur before the deprivation of employment and must provide the employee with some opportunity to respond.

In *Loudermill, supra,* the Supreme Court balanced the interests of the employer, (namely, the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens and the risk of erroneous termination) against the interests of the employee, (namely, the retention of employment and a strong interest in avoiding disruption in employment by erroneous decisions.) The Supreme Court, in footnote 8 at page 543 of *Loudermill,* stated that at least the employer will be alerted to the existence of disputed facts, its decision will be informed and the risk of error will be substantially reduced. In other words, due process requires that the employer take time to be informed about plausible arguments which may indicate that the discharge is misfounded so that error may be avoided.

The Supreme Court found that a hearing need not necessarily be elaborate and may be something less than a full evidentiary hearing. At page 545 the Court stated " * * * the pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an *initial* check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. * * * " (Emphasis added.) Further, the Court said at page 546, " * * * [t]he

opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. * * * "

Although Justices Brennan and Marshall argued for greater pre-termination procedures when "facts are in dispute," a majority of the court found that oral or written notice, an explanation of the employer's evidence and an opportunity for the employee to present his side of the story was sufficient and to require more would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. A pre-termination hearing acts as an initial check against mistaken decisions of the employer. Neither *Loudermill, supra,* nor recent case law requires a record to be made of a pre-termination hearing and we do not find plaintiff to be entitled to such a hearing by the Due Process Clause of the United States Constitution. The government's interest in the efficient dismissal of an employee for misfeasance, malfeasance or nonfeasance in office under R.C. 124.11 is not outweighed by the highly speculative possibility of the employer's fabrications and avoidance of arbitrary decisions which a record will not necessarily eradicate and for which post-termination procedures are available, specifically, in this instance, binding arbitration, at which all evidence may be examined *de novo*.

Plaintiff also contends that it has a statutory right to record pre-termination hearings pursuant to Chapter 119 of the Revised Code, the Administrative Procedure Act, which requires a record of adjudicatory hearings. An adjudication under R.C. 119.01(D) is " * * * the determination by the highest or ultimate authority of an agency of

the rights, duties, privileges, benefits, or legal relationships of a specified person, * * * ."

The pre-termination hearing at issue here is provided for by contract by agreement of the parties and is required by *Loudermill, supra,* but is not a determination by the highest or ultimate authority of an agency. The agreement entered into by the parties to this action provides that an aggrieved employee take his or her grievance to final and binding arbitration where recording of the arbitration hearings presumably is allowed rather than to the State Personnel Board of Review. See R.C. 4117.10(A). Further relief, if available, must be sought in the common pleas court rather than to the State Personnel Board of Review under R.C. Chapter 119. See R.C. 4117.09(B). By agreement, it is the arbitrator who serves as the decision-maker or higher authority. Accordingly, there is no compelling necessity for preserving the evidence received at the pre-termination hearing since a full *de novo* hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the State Personnel Board of Review whichever may be applicable. The assignment of error is not well-taken.

For the foregoing reasons, plaintiff's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and YOUNG, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Local 4501, Communications Workers of America,	:	87CV-01-623
Plaintiff-Appellant,	:	No. 87AP-902 (REGULAR CALENDAR)
v.	:	
The Ohio State University et al.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 11, 1988, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, P. J.,
BOWMAN & YOUNG, JJ.
By /s/ Alba L. Whiteside
Judge Alba L. Whiteside, P. J.

cc: Francisco A. Garabis
Anthony J. Celebrezze, Jr.
Elizabeth M. Stanton and
Wanda L. Carter

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO CIVIL DIVISION

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

PLAINTIFF,

CASE NO. 87CV-01-623

VS.

THE OHIO STATE UNIVERSITY, et al.,

DEFENDANTS.

DECISION

Rendered this 19th day of August, 1987.

CRAWFORD, J.

The Court has for consideration defendants' motion to dismiss which has been converted to a motion for summary judgment. The primary issue raised by plaintiff in its request for declaratory judgment is whether a stenographic or tape recording of pre-disciplinary proceedings is a right to which plaintiff's members are entitled.

The Court is aware of the position of defendants, which is that they do not agree that recordings of such hearings should be made. The merit of a recording or the absence of such is not the dispositive issue. Plaintiff claims a constitutional right to such evidentiary preservation. Plaintiff cites *Cleveland Bd of Edn v. Loudermill* (1985), ___ U.S. ___, 84 L. Ed. 2d 494. (sic) as the basis for a right to a pre-termination hearing. The Court agrees that said case stands for such proposition. The holding was based upon the finding that a termination of one's employment without a prior hearing was a violation of due process. *Loudermill*, supra, held that an employee should be able to

respond to charges prior to termination by appearing in person or by writing a response. The case stands for the proposition that an employee must be given an opportunity to present his side of the story before termination. The Supreme Court did not find that a full adversary or evidentiary hearing was necessary. This Court is unaware and has not been cited to any case supporting plaintiff's claim of a constitutional right to recording. Nor is the Court aware of any cases supporting the theory that a failure to provide such recording is a denial of due process.

Defendants assert that the primary grounds for dismissal is the lack of any constitutional right to the demands of a recording made by plaintiff. Defendants further assert that plaintiff has waived any right to such recording by virtue of the dispute resolution procedure followed under their contract. The contract provides certain steps in a grievance procedure as well as the right to binding arbitration. Defendants assert that if this action is proper then the action should be referred to arbitration. Defendants further contend that if the action has merit then the jurisdiction of the State Employee Relations Board should be invoked. Defendants' position is that the action is, in reality, an allegation of an unfair labor practice and as such, should be brought pursuant to R.C. § 4117 et seq.

The Court has determined that no constitutional right to recording a pre-termination hearing exists. Plaintiff's right to such must rest on grounds other than due process. The provisions for grievance and arbitration or the provisions under R.C. § 4117 must provide the avenue for plaintiff to pursue its legal recourse.

The Court must find that if plaintiff has a contractual right then arbitration as provided for by the labor contract or a charge of unfair labor practice with the State Employee Relations Board is the appropriate vehicle for resolution of the dispute. Upon consideration of the uncontroverted factual issues, the Court must conclude as a matter of law, that plaintiff's action must be dismissed.

Counsel for appellee shall prepare a judgment entry accordingly by September 1, 1987.

/s/ Dale A. Crawford
DALE A. CRAWFORD, JUDGE

COPIES TO:

Francisco A. Garabis, Esq.
for Plaintiff

Elizabeth M. Stanton, Esq.
for Defendants

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO CIVIL DIVISION

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA	:	TERMINATED
	:	Case No. 87CV-01-623
Plaintiffs,	:	Judge Crawford
v.	:	
THE OHIO STATE UNIVERSITY, et al.,	:	
Defendants.		

JUDGMENT ENTRY

This matter came on for consideration before this Court upon Defendants' Motion to Dismiss which was converted to a Motion for Summary Judgment and for the reasons stated in the decision of this Court rendered on August 19, 1987, it is

ORDERED, ADJUDGED, and DECREED that the action be dismissed with prejudice and that Defendants recover their costs.

Date: 9-3-87

/s/ Crawford
Judge Crawford

APPROVED:

/s/ Elizabeth M. Stanton
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Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 89-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantee a classified civil service employee the right to have a stenographic record or tape recording made of a pretermination hearing when the employee has a right to a *de novo* full evidentiary hearing post-termination?

LIST OF PARTIES

Respondents are satisfied with the List of Parties set forth in the Petition for Writ of Certiorari. However, the groups listed as "Related Parties" were not parties to the proceedings in the Ohio Supreme Court or to the proceedings in the lower state courts and, therefore, are not proper parties before this Court.

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Case No. 89-1750

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The citation to the opinion of the Supreme Court of Ohio is properly set forth in the Petition for Writ of Certiorari. The citations for the unreported lower court opinions in this case are as follows:

Local 4501, Communications Workers of America v. *The Ohio State University, et al.*, No. 87AP-902 (Ct. App., 10th App. Dist. Ohio Aug. 11, 1988); and

Local 4501, Communications Workers of America v. *The Ohio State University, et al.*, No. 87CV-01-623 (Ct. C. Pleas, Franklin Cty., Ohio Sept. 3, 1987).

These unreported decisions are reprinted in the Petitioner's Supplemental Appendix at 38-50.

JURISDICTION

Respondents are satisfied with the statement of jurisdiction set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The only constitutional provision involved in the question presented for review is Section 1 of the Fourteenth Amendment to the United States Constitution. No state constitutional provisions, statutes, or regulations are involved.

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Respondent cannot accept Petitioner's Statement of the Case. Petitioner's Statement of the Case is more in the form of a summary of Petitioner's argument.

Petitioner filed with the Court of Common Pleas of Franklin County, Ohio a complaint for declaratory judgment requesting that court to declare that

> The policy of The Ohio State University in refusing to permit a record to be made [through videotape, stenographic means, tape recording and/or other method of preserving testimony] is unlawful, unenforceable and void and contrary to the provisions of The Ohio and Federal Constitutions in that it deprives employees of due process of law. Plaintiff further requests judgment declaring the rights and obligations of the parties in conducting disciplinary hearings. . . .

Petitioner's Appendix at 34. Respondents moved to dismiss said complaint on numerous grounds emanating from state law and, in addition, on the ground that there is no federal constitutional due process right to tape record or record by stenographic means a pretermination "hearing." This was the only alleged constitutional due process deprivation.

There was no factual dispute that the pretermination "hearings" being conducted were in all other respects in full compliance with this Court's previous decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). Petitioner, in documents filed with the trial court, set forth facts showing that note taking at such hearings was permitted. Petitioner's Appendix at 36-37.

The court of common pleas converted the motion to dismiss into a motion for summary judgment and granted said motion. In so doing, the court held that "no constitutional right to recording a pre-termination hearing exists." Petitioner's

Supplemental Appendix at 47. The court of common pleas further ruled that, "[u]pon consideration of the uncontroverted factual issues, the Court must conclude as a matter of law, that plaintiff's action must be dismissed." Petitioner's Supplemental Appendix at 48.

Petitioner appealed the decision to the Ohio Court of Appeals, Tenth Appellate District. In that appeal, petitioner raised only one assignment of error, as follows:

> The Court of Common Pleas committed reversible error by dismissing the action by finding that civil service employees are not entitled to preserve the testimony given at a pre-termination hearing.

Petitioner's Supplemental Appendix at 38. In affirming the court below, the court of appeals held as follows:

> Neither *Loudermill, supra,* nor recent case law requires a record to be made of a pre-termination hearing and we do not find plaintiff to be entitled to such a hearing by the Due Process Clause of the United States Constitution. The government's interest in the efficient dismissal of an employee for misfeasance, malfeasance or nonfeasance in office under R.C. 124.11 is not outweighed by the highly speculative possibility of the employer's fabrications and avoidance of arbitrary decisions which a record will not necessarily eradicate and for which post-termination procedures are available, specifically, in this instance, binding arbitration, at which all evidence may be examined *de novo.*

Petitioner's Supplemental Appendix at 43.

Petitioner then moved the Ohio Supreme Court to take jurisdiction. The Ohio Supreme Court granted said motion and heard Petitioner's appeal. Petitioner set forth only one proposition of law in its appeal to the Ohio Supreme Court:

> Due process of law guarantees a classified civil service employee of the state of Ohio [the right] to preserve

testimony presented by the appointing authority and himself at a pretermination disciplinary hearing.

Petitioner's Appendix at 4. On February 7, 1990, the Ohio Supreme Court rendered its opinion and judgment affirming the decision of the court of appeals. Petitioner's Appendix at 1-13. The Ohio Supreme Court held as follows:

> We agree with the conclusion of the court of appeals that, "[a]ccordingly, there is no compelling necessity for preserving the evidence received at the pre-termination hearing since a full *de novo* hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the State Personnel Board of Review whichever may be applicable." We hold that a classified civil service employee of the state of Ohio must be afforded a pretermination disciplinary hearing; however, such hearing need not be elaborate, but must afford the employee the opportunity to have an explanation of the employer's charges and evidence againt him, and an opportunity to present his side of the story. *Cleveland Board of Education* v. *Loudermill, supra,* applied and followed.
>
> However, as found by the trial court and the court of appeals, we also hold that a classified civil service employee of the state of Ohio does not have a constitutional due process right to have a stenographic record or tape recording made of a pretermination hearing.
>
> The court of common pleas properly granted summary judgment in this case, and the court of appeals properly affirmed, on the basis that there exists no constitutional right to preserve evidence at a pretermination hearing.

Petitioner's Appendix at 10-11.

SUMMARY OF ARGUMENT

The process that is due a state civil service employee prior to termination has been determined by this Court in its decision in *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532 (1985). In that case, this Court balanced the interests of both the employer and employee and determined that the employee is entitled to notice of the employer's charges, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. This Court did not require an elaborate full evidentiary hearing where an employee has an opportunity for a full evidentiary *de novo* hearing post-termination.

Petitioner has set forth none of the grounds enumerated in Supreme Court Rule 17 in support of its Petition for Certiorari. Furthermore, Petitioner has set forth no reasons why this Court should review or expand upon its decision in *Loudermill.*

The ability to preserve testimony by tape recording or stenographic means, which Petitioner seeks to impose as a constitutional requirement, would serve neither the interests identified by this Court nor the concerns identified by Petitioner. Were such an expansion of the *Loudermill* requirements granted, the competing interests that were carefully weighed in *Loudermill* would cease to balance.

Accordingly, it is Respondents' position that the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Ohio Supreme Court in its decision in this case applied and followed this Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). In that case, this Court fully reviewed and considered the pretermination due process rights of a classified civil service employee in the State of Ohio and held that "the pretermination 'hearing,' though necessary, need not be elaborate" and that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545.

Elaborating on its holding, this Court set forth the requirements for a pretermination hearing as follows:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. [citation omitted]. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [citations omitted]. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546. This Court further concluded,

> all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute.

Id. at 547-48.

While the issue of pretermination due process rights of classified civil servants is an important question of federal constitutional law, that question has been fully reviewed and

determined by this Court in its *Loudermill* decision in which the constitutionally required due process framework for pretermination hearings for classified civil service employees was clearly and definitively established. It is apparent from that decision that the process that is due a public employee prior to termination consists of notice of the charge against the employee, an explanation of the employer's evidence, and an opportunity for the employee to be heard. This Court determined that no formalized or elaborate process for satisfying those requirements is mandated by the United States Constitution. The role of the state courts and lower federal courts now is to apply these requirements to the facts on a case-by-case basis to determine if the constitutionally mandated procedures were satisfied.

Respondents certainly agree that a balancing of interests is necessary and appropriate in determining what process is due a person who is to be deprived of a property interest. However, the pretermination process due a public employee who has a property interest has already been the subject of such analysis by this Court in *Loudermill*. This Court balanced the following interests in that case: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. After weighing those interests, this Court determined the due process constitutionally required in such circumstances. In addition, and as a part of that balancing analysis, this Court addressed the purpose of the constitutionally required pretermination "hearing." This Court found that it is not designed to provide for a definite resolution of the factual or legal issues involved in a termination. Rather, this Court held that the pretermination hearing is

> an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Loudermill, 470 U.S. at 545-46. The fact that classified civil service employees have an opportunity, post-termination, for a more trial-like hearing at which to challenge their terminations, both factually and legally, was viewed as an important variable in assessing the adequacy of the pretermination "hearing." The Court specifically noted that "our holding rests in part on the provisions in Ohio law for a full post-termination hearing." *Id.* at 546.

In the case *sub judice*, the post-termination opportunity for a full evidentiary *de novo* hearing is likewise available to Petitioner's member employees. As the Ohio Supreme Court found,

> In essence such provisions [in the collective bargaining agreement] provide full post-termination hearing rights to the plaintiff employees through impartial binding arbitration. Thus, it is the arbitration hearing, not the pretermination hearing, that is the equivalent of the State Personnel Board of Review hearing. As provided by the agreements between the parties, a record of the arbitration hearing is allowed.

Petitioner's Appendix at 8-10. Therefore, under Ohio law the employees who are the subject of the present case have, as did the employees in the *Loudermill* case, full post-termination *de novo* hearing rights.

In requesting this Court to grant its Petition for Certiorari, Petitioner has set forth none of the grounds enumerated in Supreme Court Rule 17. Subparagraph 1(a) of the Rule refers to cases heard by a federal court of appeals and, therefore, is not applicable to this case.

Subparagraph 1(b) of the Rule refers to conflict between two state courts of last resort or between a state court of last resort and a federal court of appeals with regard to the determination of a federal question. Petitioner has cited no case decided by either another state court of last resort or a federal

court of appeals which conflicts with the decision of the Ohio Supreme Court in this case. Therefore, subparagraph 1(b) is not applicable.

Subparagraph 1(c) of the Rule refers to situations where a state court or a federal court of appeals has either decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. The question presented in the Petition for Certiorari, that is, the pretermination due process rights of classified civil service employees in the state of Ohio, has clearly been settled by this Court. Those rights were determined in this Court's decision in *Loudermill*. The Ohio Supreme Court applied and followed this Court's decision in *Loudermill*. Petitioner has not alleged, nor could it, that the Ohio Supreme Court decision is in any way in conflict with this Court's *Loudermill* decision. Therefore, subparagraph 1(c) also is not applicable.

Furthermore, Petitioner has cited to this Court no cases that would indicate that the lower federal and state courts have been in conflict in their interpretation of this Court's *Loudermill* decision. Nor has Petitioner cited any cases which demonstrate less than a clear understanding or consistent application of that decision.

On remand of the *Loundermill* case, the Sixth Circuit Court of Appeals, in affirming the decision of the district court, measured the process that had been afforded Mr. Loudermill against the due process requirements set forth in this Court's decision:

> Thus, the issue is whether the meeting between Loudermill and Roche gave Loudermill adequate notice of the charges against him and an opportunity to respond thereto. In examining the facts of this case, it is clear that these requirements were satisfied.
>
> . . . .
>
> . . . Indeed, courts construing the Supreme Court's

> language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place.
>
> . . . .
>
> Since Loudermill received adequate notice of the charges against him, saw the Board's evidence, and was offered several days to respond, the district court correctly concluded that Loudermill received a pretermination hearing which satisfied the requirements of procedural due process.

Loudermill v. *Cleveland Board of Education*, 844 F.2d 304, 311-12 (6th Cir. 1988).

In the case *sub judice*, the trial court found the facts to be uncontroverted. Petitioner's Supplemental Appendix at 48. There is no factual dispute in this case as to the Respondents' full compliance with this Court's *Loudermill* decision, that is, notice, an explanation of the employer's evidence, and an opportunity for the employee to present the employee's side of the story. Petitioner is seeking a revisit to and expansion of *Loudermill*. However, it has stated no reason why this Court should so act.

Petitioner's asserted constitutional right to record by stenographic means or tape recording what occurs at a pretermination "hearing" does not comport with or enhance the purpose of the constitutionally required pretermination "hearing." As this Court stated in *Loudermill*, the purpose of affording an employee the opportunity generally referred to as a "hearing" is not to resolve definitively the factual legal issues involved in a termination. Rather, it provides an initial check against mistaken decisions by allowing an opportunity for the employee, informed of the charge and evidence against him or her, to tell his or her side of the story.

The recording or transcription of the employee's own statement would have no impact on this opportunity nor would it

somehow enhance the important "initial check." Despite the fact that this Court in *Loudermill* very clearly did not require a trial-like evidentiary hearing prior to termination, it appears that Petitioner's goal in this action is not really the creation of a record of the *Loudermill*-required "hearings," but an attempt to have this Court expand the constitutionally required pretermination procedure to include a full trial-like evidentiary hearing.

Petitioner sets forth several reasons why an employee's due process rights are violated when an employee is not permitted to make a record of the pretermination "hearing." The Petitioner asserts the pretermination "hearing" requires that: an employee is entitled "to have the evidence presented against him or in his favor"; the "evidence [must be] preserved"; the preservation is to be by "stenographic record or a recorder (video or tape)"; the pretermination hearing must be of such an extensive nature as to meet the subjective test "that the employee knows" that the employee has been dealt with fairly; and "testimony" and "testimony or evidence" must be taken including the testimony of "other employees." Petition at 7-10.

Petitioner's discussion of the asserted importance of the preservation of evidence and testimony belies the reality of what a pretermination "hearing" actually is. The rationale offered in support of Petitioner's position contemplates a pretermination hearing that is a full evidentiary hearing wherein testimony is taken from both sides. The Petitioner presumes that the "hearing" is a very formal event at which the employer does not simply inform the employee of the employer's evidence but at which the employer's evidence is presented by way of sworn testimony and cross-examination. The reasons advanced for requiring such a record of pretermination "hearings" contemplate an event that could not, for example, occur in a manager's office in the normal course of business.

The only testimony and the only evidence required at a

pretermination "hearing" is the notice to the employee of the charges against him or her, an explanation to the employee of why the employer is bringing the charges, and an opportunity for the employee to tell his or her side of the story. There is no requirement that witnesses be called, testimony be given, cross-examination be allowed, or documents be put into evidence by the employer at that time. The employer listens to the employee's explanation and determines whether or not there are "reasonable grounds" to believe that the charges against the employee are true and support a termination. *Loudermill*, 470 U.S. at 545-46.

This Court, after a careful balancing of interests in *Loudermill*, determined what process was due a civil service employee prior to termination. The process due is not a full evidentiary hearing. As did Loudermill, Petitioner's members have the right to a full *de novo* evidentiary hearing post-termination. The recording or taping of the employee's own statement as to why he or she should not be terminated would not help avoid future fabrication of testimony or evidence nor would it help avoid mistaken decisions. Once the employer has heard the employee's statement, the employer then determines whether or not to discipline the employee. If the employee believes the decision is mistaken, he or she has a remedy. The remedy is a full evidentiary post-termination hearing before an impartial decision maker at which the employer has the burden of proof.

Goldberg v. *Kelly*, 397 U.S. 254 (1970), cited by Petitioner in support of its position, is inapposite. In *Goldberg*, which involved the termination of welfare benefits, the Court pointed out that there were significantly different considerations in the welfare termination context than are present in the context of public employment. *Id.* at 264. The Court thereby clearly limited its decision to the termination of welfare benefits by specifically stating that the rationale underlying its decision did not apply to the situation of discharged employees.

In this Court's *Loudermill* decision, issued some fifteen years after *Goldberg*, this Court distinguished *Goldberg* by agreeing with *Goldberg* that, "that case presented significantly different considerations than are present in the context of public employment." *Loudermill*, 470 U.S. at 545. This Court in *Loudermill*, therefore, declined to adopt for employment termination cases the more elaborate hearing procedures required for the termination of welfare benefits. This Court found that a pretermination "hearing" in the employment arena "should be an initial check against mistaken decisions," *Id.*, and that a terminated employee is not entitled to a full evidentiary hearing pretermination when that employee has full post-termination hearing rights. More recently, in *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252 (1987), this Court affirmed its continuing recognition of the differences in due process requirements for the welfare and employment arenas and affirmed its continuing reliance upon *Loudermill*.

The *Loudermill* due process requirements have been the subject of numerous state court, federal district court and federal circuit court of appeals cases in which those courts have reviewed factual circumstances to determine their compliance with *Loudermill*. Those cases demonstrate the numerous diverse pretermination situations that arise and how this Court's *Loudermill* decision has been interpreted to protect the employee's rights. Those cases also show how the imposition of a requirement to tape record or record by stenographic means the pretermination "hearing" would either be completely ineffectual or would intrude to an unwarranted extent upon the government's interest in quickly removing an unsatisfactory employee.[1] The sound bases for

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[1] *See, e.g., Deryck* v. *Akron City School District*, 633 F. Supp. 1180 (N.D. Ohio 1986) (due process requirements met when plaintiff had opportunity to meet with supervisor to present his position prior to being terminated; the court held such pretermination meeting, which allowed supervisor to fully consider merits of plaintiff's position, was constitutionally adequate and complied with *Loudermill* requirements); *Lovvorn* v. *City of Chattanooga, Tennessee*, 647 F. Supp. 875 (E.D. Tenn. 1986) (fire fighters

these representative decisions — and the myriad of other decisions that comport with them — should not be called into question by revisiting *Loudermill*.

Petitioner cites Ohio constitutional, statutory and ad-

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afforded adequate due process where permitted to explain their side of the story to fire chief prior to their termination; the court noted that such procedure was adequate because fire fighters were also given full post-termination hearings); *Riggins* v. *Board of Regents of University of Nebraska*, 790 F.2d 707 (8th Cir. 1986) (pretermination procedures were constitutionally adequate where discharged employee was given a detailed written report regarding her misconduct, was permitted to add comments to the report, and was allowed to further present her side of the story; the court noted that pretermination procedure did not have to be elaborate, because more elaborate post-termination procedure existed even though employee did not take advantage of it); *Buschi* v. *Kirven*, 775 F.2d 1240 (4th Cir. 1985) (supervisor complied with the requirements of due process where, prior to discharging certain employees, he sought out the employees and offered to meet with them individually to give each an opportunity to be heard on the grounds for which they were being terminated; this procedure was constitutionally adequate even though the employees chose not to take advantage of those interviews); *Kelly* v. *Smith*, 764 F.2d 1412 (11th Cir. 1985) (discharged city utility department employee afforded adequate pretermination procedures where supervisor orally asked him why he was not available for stand-by duty the previous evening, the employee was given an opportunity to respond, and the employee was informed that unless he agreed to work stand-by he would be terminated; court found that these procedures gave employee notice of the charge and an opportunity to explain his position and retain his job and that said oral notice and opportunity to respond orally were sufficient to meet *Loudermill* requirements); *Brasslett* v. *Cota*, 761 F.2d 827 (1st Cir. 1985) (discharged fire chief was afforded constitutionally adequate pretermination hearing where he met with city manager to discuss possible disciplinary actions for his past conduct; the court found that at the meeting he was notified of possibility of discharge and was afforded ample opportunity to defend actions and rebut any allegations).

Compare Fairley v. *Ohio State Personnel Board of Review*, 29 Ohio App. 3d 113, 504 N.E.2d 75 (1986) (discharged employee had not been afforded constitutionally adequate pretermination procedures where the employee had no knowledge whatsoever, prior to receipt of termination notice, that his employment was endangered and, therefore, he was discharged without notice or an opportunity to respond.

ministrative provisions in its Petition. These provisions are not relevant to the question before this Court. The Ohio Supreme Court fully reviewed these issues and found no violation of Ohio constitutional, statutory or administrative law. It found that the employees in question are entitled to a full *de novo* hearing, which hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the Ohio State Personnel Board of Review, whichever is applicable. Therefore, the only issue before this Court is whether a classified civil service employee of the state of Ohio who is entitled under Ohio law to a full evidentiary post-termination *de novo* hearing is deprived of a federal constitutional due process right if the employee is denied a stenographic record or tape recording of the pretermination "hearing."

Petitioner's assertion in this case is that

> [t]he constitutional right to a pre-termination hearing carries with it the requirement that the testimony and evidence used to support a decision adverse to the employee must be preserved.

Petition at 13. It is clear from the arguments set forth in support of this position that Petitioner is seeking not simply the preservation of the employee's own statement at the pretermination hearing. Rather, it is seeking an expansion of *Loudermill* to require a pretermination hearing at which all of the employer's and employee's testimony and evidence would be presented through the direct examination and cross-examination of witnesses and the presentation of exhibits, memorialized by a formal record in a formal setting. All of this would occur prior to the employer even making the decision as to whether or not to terminate.

Such an expansion of *Loudermill* "would intrude to an unwarranted extent" upon the employer's right and ability to operate efficiently and to remove quickly an unsatisfactory employee. *Loudermill*, 470 U.S. at 546. It would lead to com-

plete duplication of the post-termination *de novo* hearing to which the employee is entitled under state law. Were such an expansion allowed, the competing interests that were carefully weighed in *Loudermill* would cease to balance.

CONCLUSION

For all the reasons set forth herein, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were sent by regular U.S. Mail, first-class postage prepaid to

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this 8th day of June, 1990. All parties required to be served have hereby been served.

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